

Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States

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There can be no denying that the entire country has witnessed loud, frequent, and riveting fireworks following the United States Supreme Court's decision in *Kelo v. City of New London*.¹ Much of the reaction may have been orchestrated by well-organized critics of the decision, but the stark and vehement differences among the Justices surely helped to trigger a striking reaction full of public outcry, many legislative responses, substantial commentary, and an unusual number of learned symposia—such as this one.

Despite the sound and fury, however, *Kelo* actually demonstrates a solid consensus among the Justices on one basic point: the Takings Clause² of the Fifth Amendment long ago was made applicable to the states by the Fourteenth Amendment.³ Everyone assumes that this issue is one of the few

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¹ ____ U.S. ____, 125 S. Ct. 2655 (2005).

² As Joseph Sax ably discusses in this Symposium, there are significant implications in whatever label one chooses as the shorthand for the Fifth Amendment's phrase "nor shall private property be taken for public use, without just compensation." For this Symposium, I will defer to the general use of "Takings Clause" by my fellow participants.

³ There was full agreement on this point in *Kelo*. Writing for the majority, Justice Stevens's first footnote stated simply: "Nor shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897)." *Kelo*, ____ U.S. at ____, 125 S. Ct. at 2658 n.1.

Justice O'Connor's dissent made it abundantly clear that she disagreed with the majority on many points, yet O'Connor was in complete agreement on this one, *id.* at ____, 125 S. Ct. at 2672 (O'Connor, J., dissenting) ("The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment"), even as she launched into her textual argument about "the unremarkable presumption that every word in the document has independent meaning." *Id.* In his *Kelo* dissent, Justice Thomas acknowledged that some state constitutions lacked just compensation clauses at the time of the founding, but claimed that this "bedrock principle" was adopted by the Framers in the Fifth Amendment, albeit "not incorporated against the States until much later." *Id.* at ____, 125 S. Ct. at 2679 & n.1 (Thomas, J., dissenting). For textual support for a "bedrock principle" that did not actually apply "until much later," Thomas cited only *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992). In that footnote, Justice Scalia's *Lucas* opinion relied exclusively on *Chicago, Burlington & Quincy*

surrounding the Takings Clause that has been settled. A month before *Kelo*, for example, Justice O'Connor used virtually the same language and the same citation concerning Fifth Amendment/Fourteenth Amendment incorporation in *Lingle v. Chevron U.S.A. Inc.*⁴ as Stevens used in *Kelo*.⁵

But there is a problem with this move. The Court is accurate in saying that the move has been used for over a century. But its problematic nature is particularly stark for anyone who purports to be a textualist. Taking constitutional texts seriously is worth a few moments, even for those of us who do not loudly proclaim ourselves to be textualists. Unnoticed or entirely forgotten though the textual problem appears to be,⁶ a brief consideration of why it arose and how the Court has filled a particularly stark textual lacuna is illuminating.

I. THE TEXTUAL PROBLEM

The Fifth Amendment ends its list of important personal guarantees as follows: "Nor be deprived of life, liberty, or property, without due process of law; <i>nor shall private property be taken for public use, without just compensation.</i> " ⁷	Section 1 of the Fourteenth Amendment, concludes in this way: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." ⁸
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Railroad Co. for the "incorporation of the Takings and Just Compensation Clauses." *Id.* Justice Kennedy's decisive concurring opinion in *Kelo* did not address the incorporation issue. But elsewhere Kennedy often has joined opinions that reflect the longstanding consensus about incorporation of the Takings Clause through the Fourteenth Amendment, indicated simply by citing *Chicago, Burlington & Quincy Railroad Co.*

⁴ ___ U.S. ___, 125 S. Ct. 2074, 2080 (2005). Here the Court was unanimous, though Justice Kennedy wrote a one-paragraph concurring opinion discussing other issues.

⁵ O'Connor relied exclusively on *Chicago, Burlington & Quincy Railroad Co.* for her point that the Takings Clause of the Fifth Amendment was "made applicable to the States through the Fourteenth." *Id.* The *Lingle* Court emphatically rejected "a freestanding takings test" and "an inquiry in the nature of a due process, not a takings, test." *Id.* at ___, 125 S. Ct. at 2083. Indeed, the Court roundly condemned the "substantially advances" formula it had earlier embraced because such a test is "tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause." *Id.* at ___, 125 S. Ct. at 2084. As we will see, however, any possible tether to the text of the Takings Clause that might be invoked to govern takings by state and local governments is, ironically, invisible.

⁶ Joe Singer makes the point that our tendency in legal education starkly to separate courses and to stress coverage may help to explain why this problem slides by. E-mail from Joe Singer, Professor of Law, Harvard Law School to author (Apr. 28, 2006) (on file with author). Property teachers tend to miss its constitutional law context, and constitutional law teachers tend to omit Takings Clause cases entirely. *Id.*

⁷ U.S. CONST. amend. V (emphasis added).

⁸ *Id.* amend. XIV, 1.

This poses an irrefutable logical problem:

1. The Framers of the Bill of Rights, i.e., James Madison and whoever else we might wish to identify as within this exalted cohort, obviously thought it important to add the Takings Clause to the “life, liberty, or property” guarantees of the Due Process Clause of the Fifth Amendment.

Core rights of “life, liberty, or property” needed to be supplemented if the constitutional text were to provide a guarantee of just compensation for the taking of private property. Thus the Fifth Amendment contains an added Takings clause, though early state constitutions did not have such a clause. The new Takings Clause protected private property rights only against takings by the federal government.

2. The Framers of the Fourteenth Amendment were well-aware of the specific language of the Fifth Amendment and of Chief Justice John Marshall’s holding in *Barron v. Mayor of Baltimore*,⁹ in which a unanimous Supreme Court emphasized that the Takings Clause did not apply to the states.¹⁰

In drafting the Fourteenth Amendment in 1866, Congress lifted the Due Process Clause from the Fifth Amendment and plugged its language *haec verba* into the Fourteenth Amendment. *But* they entirely omitted the Takings Clause. Nor does the Takings Clause language appear elsewhere in the text of the Federal Constitution.

∴ The text of the Fourteenth Amendment does not apply the Takings Clause to the states.

This omission is glaring. Like the vital clue for Sherlock Holmes when the dog did not bark in *The Adventure of Silver Blaze*,¹¹ this failure to make any Takings Clause noise ought to command our attention. Any genuine textualist has to be deeply troubled by a great paradox. How can an omitted text possibly be said to be included in the very text from which it was so clearly omitted?

As we will see, it took just such an exquisite somersault for the incorporation of the Takings Clause to be accomplished in the 1890s. A Supreme Court uninhibited by textual constraints performed the trick. Natural rights rhetoric and great and explicit enthusiasm for substantive due process provided the trampoline in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*¹² and similar cases.

⁹ 32 U.S. (7 Pet.) 243 (1833).

¹⁰ *Id.* at 250-51.

¹¹ ARTHUR CONAN DOYLE, *The Adventure of Silver Blaze*, in *THE MEMOIRS OF SHERLOCK HOLMES* (Berkely Books 1963) (1892). Sherlock Holmes understood that the dog would have been quiet only for the owner, and thereby cracked the case.

¹² 166 U.S. 226 (1897).

A. Inadvertent Omission?

As a preliminary matter, however, we should note that there is no way for a textualist to argue that the omission of the Takings Clause from the Fourteenth Amendment was somehow an oversight—a kind of mid-nineteenth century equivalent of the contemporary computer glitch. This claim cannot pass the straight-face test for several reasons:

First, it would need to ignore the clarity and great weight of *Barron v. Mayor of Baltimore*.¹³ This famous decision was acknowledged as the leading precedent on the subject, well known to any and all competent lawyers at the time of the framing of the Fourteenth Amendment. In 1833, the great Chief Justice John Marshall could hardly have been more explicit. In *Barron*, Marshall emphatically did not follow his usual nationalist instincts. Instead, he rejected a claim by property holder Barron that Baltimore's failure to dredge the sludge engulfing Barron's wharf amounted to a taking of his property without just compensation in violation of the Fifth Amendment to the Federal Constitution.¹⁴

The unanimous Court was blunt:

We are of the opinion that the provision in the Fifth Amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.¹⁵

Marshall described the question about application of the Takings Clause to the states to be "of great importance, but not of much difficulty."¹⁶ Marshall's contemporaries and those who followed virtually all agreed. For decades, *Barron v. Mayor of Baltimore* remained the standard citation for the core concept that the Federal Bill of Rights did not apply to the states.

¹³ 32 U.S. (7 Pet.) 243.

¹⁴ *Id.*

¹⁵ *Id.* at 250-51.

¹⁶ *Id.* at 247. There is much fine historical work that supports Marshall's point from various perspectives. Excellent work by legal historians such as William Treanor, Morton Horwitz, and Matt Harrington, for example, underscores the point that the very idea of the Takings Clause was a relatively late concept, not requested as a constitutional amendment by any state. It was inserted in the Fifth Amendment through James Madison largely for hortatory purposes, because people in the new Republic had little fear of the federal government taking property. See, e.g., William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); Morton J. Horwitz, *The Constitution in Perspective: Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Matthew P. Harrington, *Public Use and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002).

Indeed this point was so firmly established that in 1872 Justice Miller's unanimous opinion in *Pumpelly v. Green Bay Co.*¹⁷ had to construe the Wisconsin Constitution because, as Miller emphatically explained, the new Fourteenth Amendment did not change long-settled federal constitutional doctrine: "[T]hough the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States."¹⁸ This was four years after Secretary of State William P. Seward declared the Fourteenth Amendment officially ratified.

From the era of the framing of the Constitution and the Bill of Rights through *Barron v. Mayor of Baltimore* and well beyond, it thus was clear that a property owner could not expect to make out a federal case with any claim that a state or local government had deprived him of his property without just compensation. If one did have a colorable federal constitutional claim against a state involving property, it had to be clothed not in Fifth Amendment language, but rather in the changeable context of the Contracts Clause and/or linked to unwritten natural rights doctrine.¹⁹ In work that analyzes nineteenth century property rights claims in detail, moreover, leading legal historians such as Morton Horwitz, Stanley Kutler, Leonard Levy, William Novak, Harry Scheiber, and Gordon Wood all have emphasized the very narrow protection afforded individual property claims and the surprisingly broad deference generally given to public welfare claims.²⁰

¹⁷ 80 U.S. (13 Wall.) 166 (1872). Obviously the Court's jurisdictional rules surrounding writs of error were quite different from the current jurisdictional rules, and the Court was not similarly concerned with the niceties of "independent" and "adequate state grounds," when it reviewed state court decisions. *Michigan v. Long*, 463 U.S. 1032 (1983).

¹⁸ *Pumpelly*, 80 U.S. (13 Wall.) at 176-77.

¹⁹ See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Chief Justice John Marshall relied primarily on natural rights/common law principles and his alternative Contracts Clause claim clearly was a secondary argument. Further, Justice William Johnson's dissent relied exclusively on natural rights, anchored in "the reason and nature of things: a principle which will impose laws even on the deity." *Id.* at 143 (Johnson, J., dissenting). See also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837); C. PETER MCGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK* (1966). The antebellum Contracts Clause story is well told in STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971). See generally Harry N. Scheiber, *Economic Liberty and the Modern State*, in *THE STATE AND FREEDOM OF CONTRACT* 126-28 (Harry N. Scheiber ed., 1998); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 *VAND. L. REV.* 73 (2000).

²⁰ See Horwitz, *supra* note 16; KUTLER, *supra* note 19; LEONARD W. LEVY, *LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 71 *CAL. L. REV.* 217

Further evidence of the absence of textual support for Federal Takings Clause claims also turns up, ironically, if one actually reads the original source for the much-favored citation to Justice Samuel Chase's argument in *Calder v. Bull*.²¹ People still love to quote Chase's famous condemnation of "a law that takes *property* from A. and gives it to B" as something "against all reason and justice."²² Purported textualists fail to notice, however, what sources Chase invoked for this argument. Chase relied not on any text, but on "the *great first principles* of the *social compact*" and on "general principles of law and reason."²³ In fact, Justice James Iredell directly attacked Chase precisely on the grounds that Chase entirely lacked textual support for his claims. Iredell insisted on the need to limit judicial review through textualism because:

The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) has passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.²⁴

If it is a clear and basic violation of natural justice to take property from A to give it to B, and if federal courts must afford remedies for such injustices, there ought to be long lines of claimants, perhaps led by Native Americans and Native Hawaiians but also joined by many others. Strikingly, however, doctrines that are not anchored in text have been used repeatedly to defeat

(1984); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* (1969).

²¹ 3 U.S. (3 Dall.) 386, 388 (1798) (holding that Ex Post Facto Clause was limited to criminal legislation and thus did not bar a Connecticut legislative act setting aside a probate court decree). Justice O'Connor began her vigorous dissent in *Kelo*, for example, with this citation to Justice Chase's natural rights analysis, ___ U.S. ___, ___, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting), and Justice Thomas's dissent also relied upon it to claim that the Public Use Clause—yet another label for the Takings Clause—"embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'taking *property* from A. and giving it to B.'" *Id.* at ___, 125 S. Ct. at 2680 (Thomas, J., dissenting) (citations omitted). Unfortunately for genuine textualists, this embodiment also has no anchor in the constitutional text. See *supra* note 3. Indeed, in 1991 several leading legal historians described the *Calder* opinion as "the clearest and most definitive expression of higher-law doctrine to emanate from the United States Supreme Court." KERMIT T. HALL, WILLIAM M. WIECEK & PAUL FINKELMAN, *AMERICAN LEGAL HISTORY* 107 (1991).

²² 3 U.S. (3 Dall.) at 388.

²³ *Id.*

²⁴ *Id.* at 399 (Iredell, J., dissenting). See generally Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (examining the natural rights background and "pure interpretive model" of constitutional inquiry); Edwin Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928) (providing historical background and philosophical underpinnings of "natural law" theory of constitutional authority).

such basic justice claims concerning land grabs when raised by indigenous peoples. A version of sovereign immunity described by Justice Scalia in remarkably open-ended, nontextual fashion as “the presupposition of our constitutional structure,”²⁵ for example, defeated a claim by Native Alaskans for compensation. Other doctrines frequently excuse unjust laws that strongly suggest actions that are “taking from A. to give to B.”²⁶ Within the familiar tension between natural justice and the technicalities of lawyers’ law, it is easy to discern a pattern that has not favored people who held property initially, had it taken away in a variety of ways over time (often with the help of lawyers), and recently have sought legal redress.

B. Possible Explanations for the Omission from the Fourteenth Amendment

Why was the Takings Clause omitted from the Fourteenth Amendment? One possibility is that *Barron v. Mayor of Baltimore* was so well entrenched that it might seem a radical departure to try to change its approach to property rights on the local level. Another reason is probably even more salient: by the time of the Civil War and the Reconstruction-era constitutional amendments, the issue of slavery had raised the stakes about both property rights and natural rights in complex ways. At the time the 39th Congress began drafting the Fourteenth Amendment in 1866, the leading members of Congress and

²⁵ *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (Native Alaskan Village akin to foreign sovereign and thus barred from suing state), discussed in AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 85-88 (1995); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54-73 (1996) (Congress lacks Commerce Clause power to abrogate Eleventh Amendment immunity).

²⁶ *Calder*, 3 U.S. (3 Dall.) at 388. Judges often use a variety of nontextual constructs to bar compensation claims made by historically subordinated groups. See, e.g., ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* 52-53 (2002) (compensation claims by victims of the Tulsa race riots barred by the statute of limitations); Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994). In *Hall v. United States*, 92 U.S. 27 (1875), when the Court analyzed the claim of a former slave to a share of cotton that he toiled to produce, the Justices unanimously described the Court’s task to be to “roll back the tide of time, and to imagine ourselves in the presence of the circumstances by which the parties were surrounded when and where the contract is said to have been made.” *Id.* at 30. The Court then found it unproblematic to bar plaintiff’s claim because, as a slave, he could not legally contract.

There has been a good deal of important recent work dealing with reparations issues in the United States. See, e.g., ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003); William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002).

their allies very recently had "taken" huge amounts of "property" from southern slaveholders worth many millions of dollars. Just compensation, to put it mildly, was not a high priority in the context of the Thirteenth Amendment, nor can it be said to have had much to do with the new inclusion of "privileges or immunities" or "equal protection" in the Federal Constitution through the Fourteenth Amendment.

That Congress was sensitive about the takings issue is underscored by its enactment, during the Civil War, of the District of Columbia Emancipation Act.²⁷ In addition, at the very time that Congress passed the Civil Rights Act of 1866 over President Andrew Johnson's veto and promulgated the text that became the Fourteenth Amendment, the shape of Reconstruction was still open and hotly contested. As Republicans sought to establish an effective Reconstruction policy, some of their leaders favored the redistribution of southern land so that even "40 acres and a mule" still seemed a real possibility.²⁸

II. NATURAL RIGHTS, EQUITY, AND THE LATE NINETEENTH CENTURY

The decisions that began to apply the Just Compensation Clause to the states in the 1890s merit close scrutiny. As we have seen, for instance, the *Chicago, Burlington & Quincy Railroad Co.*²⁹ decision is the basic source for Justices on all sides in *Kelo* to apply Takings Clause protections against actions by the states. But even this key decision generally receives only passing, formulaic attention.

If we read the whole *Chicago, Burlington & Quincy Railroad Co.* decision, however, several important ironies emerge. First, it is absolutely clear that Justice Harlan's majority opinion was insistently nontextualist. In characteristic fashion, Harlan did not even try to anchor his analysis within the text of the Constitution.³⁰ Nor did he attempt to distinguish key precedents such as *Barron v. Mayor of Baltimore* and *Pumpelly v. Green Bay Co.*

²⁷ The District of Columbia Emancipation Act, ch. 54, § 1, 12 Stat. 376 (1862) (provided compensation plan for slaves taken from slaveholders loyal to the Union). For a good discussion of related issues on the Confederate side, see Al Brophy, "Necessity Knows No Law": *Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases*, 69 MISS. L.J. 1123 (2000).

²⁸ See generally Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

²⁹ 166 U.S. 226 (1897). Chief Justice Melville Fuller did not take part, and Justice David Brewer dissented because he believed the majority did not go far enough in protecting the rights of the property holder.

³⁰ For a good description of Harlan's abiding enthusiasm for judicial intervention through substantive due process, see LINDA PRZYBYSEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 158-67 (1999).

Instead, Harlan's opinion asserted that "natural equity"³¹ compelled the Court to stretch Due Process protections beyond procedure to substance. He relied primarily on a smattering of state court decisions and treatises he favored. At one point, in fact, Harlan simply asserted: "Due protection of the rights of property has been regarded as a vital principle of republican institutions."³² Perhaps "due protection" ought to be a constitutional concept. Yet as invoked here by Justice Harlan, the phrase almost makes a joke of the claim that judges ought to be limited by a specific constitutional text.

Further, Harlan was quite explicit that substantive due process was the doctrine upon which the Court relied. He wrote, for example, that "judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that [a state's] final action would be inconsistent"³³ with the Fourteenth Amendment.

In retrospect, there is a great deal more that is ironic in this opinion. The majority insisted that the Seventh Amendment jury trial right applies to state jury trials.³⁴ In a final irony, the majority upheld—over Justice Brewer's strenuous dissent—the Illinois jury's decision to award a symbolic one dollar to the railroad even though the city put a street across its railroad tracks. This, Harlan wrote, was "a fair and full equivalent for the thing taken" by the public.³⁵

³¹ *Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 238.

³² *Id.* at 235-36.

³³ *Id.* at 234-35.

³⁴ *Id.* at 242-43. The last clause of the Seventh Amendment, according to the Court, "applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the State." *Id.* Harlan noted that state court jury decisions could be reviewed "only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation." *Id.* at 246. In contrast to the broad Takings Clause part of Harlan's opinion, these more specific and more procedural Seventh Amendment aspects have not been followed. See, e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) (no federal right to civil jury trial in state courts).

³⁵ *Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 242. Harlan's extensive discussion of this point emphasized that the railroad "took its charter subject to the power of the State to provide for the safety of the public" and "laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety." *Id.* at 252.

Indeed, Harlan announced:

The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks, as the public convenience required, and under such restrictions as might be prescribed by statute.
Id. at 250.

This was hardly a glorious period for the Supreme Court. The Justices who produced the *Chicago, Burlington & Quincy Railroad Co.* decision had given the world *Plessy v. Ferguson*³⁶ less than a year earlier. Also this was basically the same array of Justices who had handed down an infamous trilogy of decisions in 1895, including one that Charles Evans Hughes famously cited as an example of the Court's "self-inflicted wounds."³⁷ This Court's struggles to invalidate paternalistic government action and class-based legislation produced inconsistency at best³⁸ and the Justices' frequent wrestling with substantive due process in the realm of Takings by both federal and state governments³⁹ offers a cautionary tale.

It is illuminating to consider how sharply the presumptions in the Court's recent regulatory takings decisions contrast even with those of the Court in *Chicago, Burlington & Quincy Railroad Co.* See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

³⁶ 163 U.S. 537 (1896).

³⁷ CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50-54 (1928) (Hughes listed the rehearing, switched vote, and ultimate invalidation of the federal income tax in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 696 (1895), as one of three examples of the Supreme Court's self-induced "disesteem." Two other notorious decisions in 1895 were: *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (Congress lacked constitutional authority to regulate acquisition that gave single corporation control of ninety-eight percent of nation's sugar refining capacity) and *In re Debs*, 158 U.S. 564 (1895) (federal government had inherent power to use labor injunction against union leadership to halt national Pullman strike)). See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960).

³⁸ See, e.g., Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. OF AM. HIST. 970 (1975); Richard Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667 (1980); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987).

³⁹ *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896) (upholding federal taking of battlefield as an incident of federal sovereignty); *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896) (preceding *Chicago, Burlington & Quincy Railroad Co.* in invoking Fourteenth Amendment due process to uphold railroad's Takings claim, thereby reversing the Nebraska Supreme Court decision that allowed the State Board of Transportation to order railroad to permit farmers to build needed grain elevator on railroad right of way). There is, moreover, deep historic irony in the almost forgotten fact that the Court had earlier considered Bill of Rights claims against a state as it reviewed the Illinois conviction of August Spies in *Spies v. Illinois*, 123 U.S. 131 (1887). Spies, an anarchist on the lam after the Haymarket Riot of 1886, successfully eluded capture until he turned himself in. Apparently his trust in the legal process was misplaced. Spies was executed after the United States Supreme Court rejected his federal constitutional claims.

III. FEDERALISM AND FEDERAL COURT JURISDICTION

Justice Holmes may have transformed the law of takings with his balancing test or spectrum approach in *Pennsylvania Coal Co. v. Mahon*.⁴⁰ But it took decades more for federal courts to be drawn back into the maelstrom as they had been in decisions from the 1890s-World War I era. New-fangled zoning, upheld by the Court in the late 1920s and practical jurisdictional constraints on federal courts combined with more permissive notions of the appropriate role of government to keep lower federal court judges from becoming much entangled in local property disputes. There were even several property-specific prudential abstention doctrines such as *Burford v. Sun Oil Co.*⁴¹ and *Louisiana Power & Light Co. v. City of Thibodaux*⁴² that warned federal courts away from even attractive nuisances.

The *Lucas-Nollan-Dolan* revolution, however, has forced federal judges into a briar patch of intricate pleading, delays, duplicated efforts, and unseemly interventions. The esoteric elements of the decision last Term in *San Remo Hotel v. City and County of San Francisco*,⁴³ for example, underscore how treacherous the terrain has become for any lawyer hoping to get a ripe and final state court decision regarding just compensation without waiving possible federal constitutional attacks. Interestingly, for example, most of the heat in the lower court debate in *Hawaii Housing Authority v. Midkiff*⁴⁴ concerned whether and what kind of abstention rules ought to apply.⁴⁵

⁴⁰ 260 U.S. 393 (1922).

⁴¹ 319 U.S. 315, 332 (1943) (invoking "equitable discretion" to give Texas courts the first opportunity to consider "basic problems of Texas policy" in a dispute over oil well drilling permits). See also *Ala. Public Servs. Comm'n v. S. Ry. Co.*, 341 U.S. 341 (1951) (stressing importance of allowing state authorities to handle "an essentially local problem" regarding train regulations).

⁴² 360 U.S. 25 (1959) (divided court upheld federal district court decision in diversity case to stay federal case, pending resolution of state proceedings regarding city condemnation action). Ever since, students in Federal Courts classes have struggled to reconcile the *Louisiana Power & Light Co.* decision with *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), handed down the same day. In *County of Allegheny*, when Justices Stewart and Whittaker switched sides, Justice Brennan's opinion for the Court disallowed federal abstention in a Takings Clause action, terming abstention "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* at 188-89.

⁴³ ___ U.S. ___, 125 S. Ct. 2491 (2005). The case involves an intricate minuet of trying to preserve a federal claim in state court, following federal court abstention, while both making sure a takings claim is ripe and trying to avoid falling prey to various esoteric rules regarding federal preclusion.

⁴⁴ 467 U.S. 229 (1984).

⁴⁵ *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom. Midkiff*, 467 U.S. 229.

Here I should confess that a long time ago I went on record at considerable length and in overly intricate detail criticizing federal court abstention, at least of the *Younger v. Harris*⁴⁶ variety. Yet decades later, it seems clearer to me that there may be some forms of prudential federal court abstention that are at least justified and probably to be recommended. It begins to seem that a major example ought to be within the realm of takings/just compensation jurisprudence.⁴⁷

We also ought to be skeptical about the wisdom, and even the constitutionality, of current proposals that Congress reach into the realm of state property law to "overrule" or limit *Kelo* by federal fiat. The spending power might stretch past the breaking point if it were to be used in this context. This is so for a variety of reasons, not least the problems caused by the use of an attenuated basis for direct interference by Washington, D.C. with traditional, integral, and essential state functions within the regulation of property.

IV. BEDROCK PRINCIPLES AND THE SANDS OF TIME

Narrow textualist claims are doomed to failure. Even the staunchest contemporary self-proclaimed textualists easily can be shown to manipulate or ignore texts they do not much like.⁴⁸ There may or may not be what the separate *Kelo* dissents each dub as "a bedrock principle"⁴⁹ in the realm of

⁴⁶ 401 U.S. 37 (1971). See Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977). I also helped write the brief for the winning side in *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496 (1982), a decision that established that there should be no need to exhaust administrative remedies before invoking federal court jurisdiction under the Civil Rights Act of 1871, currently 42 U.S.C. § 1983 (2006).

⁴⁷ Carol Rose suggests a distinction that might allow abstention in the context of regulatory takings litigation, but not in eminent domain disputes. E-mail from Carol Rose, Lohse Chair in Water and Natural Resources, University of Arizona, James E. Rogers College of Law to author (May 02, 2006) (on file with author).

⁴⁸ Indisputably stretching the Eleventh Amendment beyond its language comes to mind immediately, for example, as does entirely ignoring the words of the Ninth Amendment. It turns out that self-proclaimed textualists such as Justices Scalia and Thomas are sometimes not bound by words even when it comes to interpreting statutes or quoting dictionaries. See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, concurring in a decision that refused to award civil rights attorneys' fees and used a crabbed interpretation of "prevailing party," insisted on a "term of art" interpretation: "Words that have acquired a specialized meaning in the legal context must be accorded their legal meaning"); *Olmstead v. Linn*, 527 U.S. 581, 616 (1999) (Thomas, dissenting in *Americans with Disabilities Act* ("ADA") case, purporting to rely on a dictionary definition of "discrimination" that misrepresented and even misquoted dictionary source, discussed in Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1296 n.68, 1315-16 (2000)).

⁴⁹ ___ U.S. ___, 125 S. Ct. 2655 (2005). O'Connor described "a bedrock principle without which our public use jurisprudence would collapse" that forbids any "purely private taking"

property rights and takings. A viable principle might sensibly boil down to unconstitutional arbitrariness. But we already have constitutional texts and precedents that invalidate such arbitrariness with much less strain than recent Takings Clause decisions. This is particularly the case now that the Court has handed down its anomalous little *per curiam* opinion in *Village of Willowbrook v. Olech*.⁵⁰

Yet when we say that we feel bound by the text, we really ought to attend to the words with some care. The blundering Fifth Amendment-Fourteenth Amendment piñata contest around the Takings Clause makes it hard to claim with a straight face that there is textual or contextual support even to apply that Clause to the states.

If, instead, we want to add words that were intentionally omitted, we ought to own up to doing so. That would entail interpreting law in the name of fundamental values: equity, fairness, and other appealing albeit vague concepts that otherwise might be dubbed judicial activism, or worse.⁵¹

Indeed, to slip the anchor of textual constraint as clearly as the Court has done with the Takings Clause is to sound a lot like someone who believes, for example, that there may be a privacy right in the Federal Constitution. Or like a lawyer or a judge who relies upon unspecified, inherent executive power that seems to become infinitely distensible, no matter what the constitutional text and judicial precedents say.

But that is another story.

without a justifying public purpose, even if just compensation is paid. *Id.* at ___, 125 S. Ct. at 2674 (O'Connor, J., dissenting). Thomas's bedrock principle is different. He claimed "a bedrock principle well established by the time of the founding" that provides "that all takings required the payment of compensation." *Id.* at ___, 125 S. Ct. at 2679 (Thomas, J., dissenting). Shifting bedrock could make one wary about the stability of its foundations.

⁵⁰ 528 U.S. 562, 565 (2000) (allegations of "irrational and wholly arbitrary" conduct by Village in dealing with property owners deemed "quite apart from the Village's subjective motivation . . . sufficient to state a claim for relief under traditional equal protection analysis"). Such an open-ended approach to equal protection analysis—apparently not requiring the usual prerequisite of discriminatory motive—provoked a concurrence by Justice Breyer in which he attempted to contain the danger of "transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.* at 566 (Breyer, J., concurring).

⁵¹ In *Lingle v. Chevron U.S.A. Inc.*, ___, U.S. ___, 125 S. Ct. 2074 (2005), for example, the Court paradoxically rejected as "regrettably imprecise" its earlier formula that examined ends and means and asked whether a regulatory taking "'substantially advances'" legitimate state interests. *Id.* at ___, 125 S. Ct. at 2083 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). In its place, the Court explicitly substituted an undifferentiated substantive due process test, to be employed henceforth by judges "addressing substantive due process challenges to government regulation." *Id.* at ___, 125 S. Ct. at 2085.

